

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1140

To Be Argued By
BERNARD S. MEYER

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID STIRLING, JR., WILLIAM G. STIRLING,
HAROLD M. YANOWITCH, EDWIN SCHULZ
and RUBEL L. PHILLIPS,

Defendants-Appellants.

**BRIEF FOR DEFENDANT-APPELLANT
HAROLD M. YANOWITCH**

HAWKINS, DELAFIELD & WOOD
Attorneys for Defendant-Appellant
Harold M. Yanowitch
67 Wall Street
New York, New York 10005

MEYER, ENGLISH, CIANCIULLI &
PEIREZ, P.C.
Attorneys of Counsel for Defendant-
Appellant Harold M. Yanowitch
160 Mineola Boulevard
Mineola, New York 11501

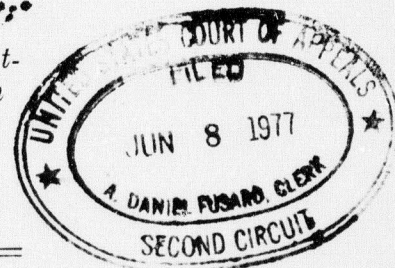


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ABBREVIATIONS

References to the Joint Appendix are preceded by the letter "A", followed by the number of the page to which reference is made, e.g., "A 301". References to the Indictment are preceded by the abbreviation "Ind."

References to the Exhibit Volume are preceded by the letter "E", followed by the number of the page to which reference is made, e.g., "E 410".

References to Government Exhibits and Defendants' Exhibits not reproduced in the Exhibit Volume are preceded by "GX" and "DX" respectively, e.g., "GX 580", "DX 42".



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PHILLIPS,

Defendants-Appellants.

BRIEF OF APPELLANT HAROLD M. YANOWITCH

Statement

Harold M. Yanowitch appeals from a judgment of conviction entered on March 11, 1977 in the U. S. District Court for the Southern District of New York, after a trial before the Hon. Marvin E. Frankel and a jury. Defendant was convicted on nine counts of an indictment charging fraud in the sale of securities (Section 17 of the Securities Act of 1933, 15 U.S.C. §77q(a)), false statements in the filing of a 1971 Registration Statement for the sale of Stirling Homex preferred stock (Section 24 of the Securities Act of 1933, 15 U.S.C. 77x), mail fraud (18 U.S.C. §1341), and conspiracy to violate the foregoing

statutes (15 U.S.C. §371). All counts were predicated upon specifications set forth in paragraphs 10 through 16 of the indictment.

QUESTIONS PRESENTED

1. Did the trial court deprive defendant of rights guaranteed to him by the Fifth Amendment, and thus deprive him of a fair trial, by its refusal to strike a specification, common to all counts of the indictment, alleging the same acts and transactions for which he had previously been indicted and punished in the Western District of New York?

2. Did the trial court err in charging the jury that, in a case where defendant alleged reliance upon expert opinion, such reliance did not afford any defense if, without so intending, defendant did not make full disclosure of all matters which the expert deemed essential to his opinion?

3. Did the trial court err in failing to withdraw certain specifications, not supported by sufficient evidence and/or barred by the Fifth Amendment from the jury's consideration?

4. Did the trial court deprive defendant of a fair trial by reason of its gratuitous suggestion of perjury during its charge, its exclusion of defense witnesses, and its limitation of the cross-examination of prosecution witnesses?

STATEMENT OF FACTS

The Parties

David Stirling, Jr. was Chairman of the Board of Directors and Chief Executive Officer of Homex at all times relevant to this action. Mr. Stirling was born in Canada, the son of a butcher. After 10 years of formal education, he became involved in carpentry and house building in Canada. He later migrated to the Rochester, New York, area where he successfully operated Stirling Brothers, Inc., a company committed to the development and construction of town houses and apartments, all for their own account and operation, never selling or operating as traders or speculators.

William G. Stirling, brother of David, was President, Chief Operating Officer and Director of the Company. His background is essentially the same as that of his brother and partner David.

Harold M. Yanowitch was Executive Vice President and General Counsel and Director of Homex. He is a native of Rochester, New York, and maintained a general practice of law in a three-man law firm. He withdrew from private practice after 20 years with an impeccable reputation in his community when he accepted appointment as Executive Vice President and General Counsel of Homex.

Edwin J. Schulz was originally controller and then Senior Vice President and Controller.

Rubel L. Phillips, a Mississippi attorney, was a Homex

officer, responsible for the southern operations of Homex.

The Corporation and Non-Parties

Stirling Homex Corporation was incorporated by David and William Stirling in Delaware in 1968 with its principal plant and office located in a suburb of Rochester, New York, known as Avon. At a time when the United States Government was pressing to provide low income housing, they were one of the nation's few producers of multi-family modular housing. The modules were manufactured on an assembly-line, using conventional building materials, and were combined at the housing site to form completed dwelling units. Most sales involved two-story, attached, wooden frame town houses. The company had designed and built a concrete and steel frame module for use in high-rise buildings and had been selected by various housing authorities and the Department of Housing and Urban Development ("HUD") to build high-rise buildings utilizing concrete and steel frame modules.

All of the company's sales of dwelling units for the 21 months ended April 30, 1971 represented sales to and orders from local housing authorities and non-profit corporations. Generally, upon receipt of a commitment from a customer, the company purchased the land, prepared the site, laid the foundations, arranged utility connections, manufactured, installed and connected the modules and landscaped the housing site, thereby providing a total service to the purchaser in delivering turnkey housing. Modules were equipped during manufacture with necessary

plumbing and heating fixtures, electrical wiring, appliances and floor and wall coverings. Houses were generally built in movable modules and the modules were assembled on the land site within approximately four hours after their delivery. Secretary Romney of HUD considered the Homex method a major breakthrough in American home construction and vigorously supported its development. Homex was selected by HUD from several hundred applicants in national competition to participate in "Operation Breakthrough", a major project to provide low income housing for American citizens.

The rising national need for new homes, coupled with the continued low level of new housing starts, created a vast market for industrialized housing. Projects were underway in Akron, Ohio; Erie, Pennsylvania; Rochester, New York; Worcester, Massachusetts, and other areas.

Homex was the first modular housing manufacturer to sign a national labor contract with the United Brotherhood of Carpenters and Joiners of America (AFL-CIO) for both in-plant production and on-site installation. This feat was accomplished by a prominent New York labor lawyer, Theodore W. Kheel, who became a director of the company before its first registration statement and remained so during all relevant times. Kheel's law firm, Battle, Fowler, Stokes & Kheel, received a \$50,000 per year legal retainer for its services in connection with labor relations of Homex.

Harper Sibley, Jr., a Rochester, New York and Miami, Florida business promoter, was a director of Homex from the company's inception until the fall of 1970. In addition, he was a major stockholder of Homex, sold a substantial portion of his stock and realized gains of nearly \$14 million.

Peat Marwick Mitchell & Co., a certified public accounting firm, was the independent auditor of Homex beginning in 1971 and certified the 1971 financial statements of Stirling including the financial statement contained in the company's 1971 Registration Statement with the SEC. It did audits and quarterly reviews; was consulted continuously before any action was taken affecting accounting, structured proposals and described the consequences thereof; and reviewed all SEC filings and provided regular in-put.

William Murray, a certified public accountant, was a partner in Peat Marwick's office who headed Peat Marwick's audit of Homex.

Harris Kerr Forster & Company, a certified public accounting firm, was independent auditor of Homex through the 1970 fiscal year and for the company's initial private placement and public offering of its securities in 1970. Harris Kerr Forster also permitted its opinion with respect to the 1970 fiscal year to be included in the 1971 Registration Statement.

Merrill Lynch, Pierce, Fenner & Smith, a New York broker-dealer registered with the SEC, was investment banker and principal

market maker of Homex from January 1971 until the time of bankruptcy in July 1972. In addition, Merrill Lynch made an extensive retail effort in selling Homex securities.

Brown, Wood, Fuller, Caldwell & Ivey, a New York law firm, was underwriters' counsel to the underwriting syndicate in connection with the 1971 public offering of the securities of Homex.

Chemical Bank, a New York bank, was a substantial creditor of Homex and lead bank in the company's revolving credit arrangement.

Shea, Gould, Climenko & Kramer, a New York law firm, was general counsel to Homex in connection with the 1971 public offering of Homex securities and performed various other legal services to Homex from 1969 to 1972.

The Operations of Homex

As indicated, Homex was founded in August, 1968, as a Delaware corporation. The company had its genesis a few months earlier in April, 1968, when David Stirling, Jr., William G. Stirling and their father, David Stirling, Sr., formed the Stirling Cubet Corp. to make apartments in a factory for projects they were building in conjunction with Harper Sibley, Jr. ("Sibley"). Upon incorporation Sibley received 1.4 million shares

of common stock and the Stirlings got 5 million shares of common stock as founders. Shortly after incorporation, Homex had a private offering selling 1:6 million shares of stock at \$1.00 each.

Initially, Homex was a relatively small manufacturing and construction company doing business primarily with affiliates or partnerships of the Stirlings and Sibley. By March of 1969 Homex had negotiated a preliminary agreement for a public offering with R. W. Pressprich and Company, Inc. ("Pressprich"). Starting in late 1969 and by the time its offering had become effective in 1970, Homex was primarily concentrating its operations on sales to public housing authorities in federally financed housing programs. The market reception for the stock according to the SEC was "nothing short of fantastic". The price more than doubled the first day, closing at \$34. Within six weeks it soared to nearly \$52.

The initial offering allowed Homex to go forward with a plant expansion program designed to manufacture greater product. It subsequently became apparent that they required more capital to do this and Homex began planning a public offering solely for the Company that would later be underwritten in July of 1971 by Merrill Lynch to sell 500,000 shares of preferred stock.

Although defendant Yanowitch was general counsel to the firm, he recognized his limitations in the SEC field by hiring, as an in-house expert in securities law matters, one Jerome Dienstag. However, for the private placement circular and the public offering, Shea, Gould came in and authored and prepared all necessary documents for filing with the Commission. The

Homex officers cooperated fully, made all of their business and personnel records available to the specialists, completely relied upon their advice, and followed it. There were no precedents or textbooks for industrialized housing legal problems where problems ranged across land acquisition, zoning, planning government projects, and other areas.

By early 1972, a \$55 million revolving credit loan agreement had been executed between Homex and the banks. In April, 1972, the banks took effective control of the company, dictating when it could manufacture modules and when it could pay dividends. Indeed, the banks consented to a preferred dividend payment as late as April, 1972, approximately three months before Chemical called its loan. Shortly prior to this event, Homex announced that it had suffered a sizable loss in its first six months of the 1972 fiscal year. The news of this sudden reversal had a dramatic effect on the price of its stock sending it plummeting until July 12, 1972, when Homex filed a petition for reorganization in Chapter 10 of the Bankruptcy Act.

The Proof Offered With Respect
to the Indictment

The charges against Yanowitch dealt with four distinct areas: the accounting practices employed by Homex; three land transactions which were included in various income statements in 1969 and 1970; the claim that Homex's SEC filings had failed to disclose "pay offs" to union officials; and the receivables book in connection with the Greater Gulf Coast Housing Development Corporation.

Accounting Principles

The weakest part of the prosecution's case against the Stirlings and Harold Yanowitch was its attempt to connect them with an alleged failure to disclose misleading accounting practices to Homex's auditors (Ind., ¶¶13, 15; A 15, 16). As the case developed, it soon became clear that none of these defendants, who had disclaimed any accounting expertise, had either sponsored or initiated these practices. Indeed, even as to the principal defendant on these charges, Homex's vice-president and controller Edwin A. Schulz, the evidence generally indicated that the practices -- principally the reassignment of modules between projects -- were neither misleading nor undisclosed.

The prosecution charged that defendants (other than Phillips) had falsely represented in its SEC filings that it recognized income when modules were assigned to a specific contract, when "the defendants well knew, such assignments had been repeatedly cancelled or revised with modules then being reassigned from project to project. . ." (Ind., ¶13; A 15).^{*} This was hardly misleading: the bulk of the reassignments took place within the same quarterly reporting periods, and prosecution witness Mauriello testified that, from an accounting standpoint, the company would properly wait until the final day of such period to decide which module was assigned to which contract (A 368).

^{*}Of course, the falsity of such representation could only be assumed if the word "assigned" were held to imply irrevocably assigned. The simple fact that modules previously assigned to one contract would be taken off that contract and assigned to another contract (as would happen when it appeared likely that the latter project would be completed sooner than the first) does not mean that Homex's sales figures did not reflect "assigned" modules.

Most importantly, there was no evidence that either the Stirlings or Yanowitch had ever misled Homex's auditors or even knew about the existence of such reassignments. Indeed, prosecution witness Donald Kesel testified that the Peat Marwick auditors had seen all of the entries relating to assignments, and that each entry involving a reassignment had an explanatory footnote stating that it was a reversal of a previous assignment (A 345-47).*

The balance of the indictment charged that Homex had overstated its 1970 earnings by failing to include approximately \$500,000 in estimated cost overruns, had improperly recorded a \$300,000 fee due from Greater Gulf to U. S. Shelter, Homex's financing subsidiary, and the inclusion of an \$832,000 expenditure recorded in connection with the preparation of the Mississippi plant which was never built (Ind., ¶15; A 16). The testimony offered by the prosecution did not support these charges.

The critical testimony supporting the allegation relating to the cost overruns was Schulz's grand jury testimony

* The prosecution claimed that, notwithstanding the journal entries, Peat Marwick had been misled because Homex's Operations Control Department used two different computer runs, denominated "File 1" and "File 2", to keep track of its module inventory, and the former was never supplied to Peat Marwick. Aside from the fact that neither the Stirlings nor Yanowitch had any connection with these files, they were not the "double set of books" which the prosecution claimed. File 1, never shown to Peat Marwick, was a working file which was duplicative and unwieldy, in large part because the modules were given different serial numbers by different Homex departments at different times (A 372-73, 376-80). For auditing purposes, File 1 was useless, because it did not indicate the contract number of modules which had been assigned to a "general" site plan. File 2 would show the contract for such assignments (A 374-75). Peat Marwick, in using File 2 for its physical inventories, was aware that the assignments included those which had been made to general site plans (A 409).

in which he stated that he had told his subordinate, David Christman, to enter the overruns against the succeeding fiscal year (A 362-66). The testimony did not intimate that the Stirlings or Yanowitch had been aware of Schulz's decision, nor that it had ever come to their attention. Likewise, the U. S. Shelter fee was only improper if the Stirlings and Yanowitch knew that the Farmers Home commitment letter was a forgery and there is no evidence that they knew it was a forgery -- a fact which was hotly contested at trial by both expert and lay witnesses. Finally, prosecution witness Murray, the Peat Marwick partner in charge of Homex's 1971 audit, testified that the expenses charged for the proposed Mississippi plant were entirely proper (A 400-01, 420).

The Land Transactions

The major portion of the case against the Stirling brothers and Mr. Yanowitch was based upon the sale of three pieces of property in Clay, New York, adjacent to or near an apartment complex known as Hollyrood Park built by Stirling's company prior to the first public issue. The Stirlings had a 12% interest in Hollyrood Park Associates, whose general partner was Peter Thun (A 381-82). As Homex became increasingly active in the modular housing field, it sought to divest all of its real holdings (A 443). During 1969 and 1970, Thun, who had invested \$7 million in Hollyrood Park, purchased an adjacent plot of 16 acres for a price of \$325,000; Raseac Realty, a corporation owned by two of Yanowitch's clients and one of their friends,

bought an adjacent parcel of 15 acres for \$425,000 before Homex's first public offering; and 57 & 31 Corporation purchased a nearby parcel of 145 acres for \$2.1 million.

At trial, the government attempted to demonstrate that all three sales were really sham transactions, affected by side promises which had not been disclosed in Homex's filing with the SEC. With constant reference to the fact that in each case the purchasers were shell corporations, that the properties were purchase-money mortgaged, and that the down payment was either 10 to 20 percent of the purchase price, the prosecution sought to prove that these were "phony" sales, despite the fact that these are common attributes of most transactions involving undeveloped real property.

The testimony adduced at trial -- from the government's own witnesses -- squarely contradicted the sinister connotations contained in the indictment. All of the participants testified that these were arm's length transactions, that the sale price was not inflated, and that the so-called "side agreements" were either immaterial or non-existent. Notwithstanding the total paucity of proof, the court refused defendants' request to strike these charges and thus permitted the jury of laymen to consider whether the real estate transactions were sham sales simply because the purchaser of each was a "shell" corporation, the sale was not a totally cash transaction, and Homex took back a purchase-money mortgage.

(a) Raseac Realty

In June 1969, while still in private practice and prior to Homex's registration, two of Yanowitch's clients, Dr. Morris Shapiro and Caesar Falcone, in response to their request to find them an investment and after learning of Homex's desire to divest itself of its shopping center site, were informed about the possible acquisition of approximately 15 acres immediately to the east of Hollyrood Park (A 213). Falcone and Shapiro, both government witnesses, were experienced real estate investors, and Shapiro had asked Yanowitch to look out for possible investment opportunities (A 217, 227). Because he was one of the outside counsels to Homex, Yanowitch told them that they would need independent counsel to represent them if they decided to buy the property (A 214). The purchasers were represented in the transaction by Gerald Beckerman, Esq. and, since Yanowitch had left private practice prior to the consummation of the sale, Homex was represented in the transaction by John Garrity, a former law partner of Yanowitch who was engaged in private practice, who was not called as a witness.

At a meeting with Shapiro, Falcone and Barbato, Yanowitch allegedly told them, in the presence of David Stirling, that if the venture did not work out -- the property was to be developed by the buyers as a shopping center -- he would find someone to buy the property from them (A 215).*

* Only Barbato and Falcone claimed that David Stirling was present at the time of this representation. Dr. Shapiro denied that he had any dealing with David Stirling (A 224-25). No one claimed that William Stirling had any part in this transaction.

or Shapiro claim that this commitment was made on behalf of Homex, or even David Stirling individually (830). Attorney Beckerman, in examining the applicable zoning ordinance, found that there was a restriction prohibiting the sale of liquor or certain foods, but nothing prevented a shopping center. The purchase-offer was carefully drafted by Beckerman and contained two express conditions and warranties: (1) that the property was zoned for a shopping center and (2) there was a bona fide option on the part of Gulf Oil to purchase .6 of an acre of the 15-acre site for \$100,000.

Prior to closing, Beckerman drafted a proposed indemnification agreement providing a commitment that Kabeth (the Homex subsidiary which owned the property) would take back the property in the event that a zoning variance could not be obtained removing the above restriction. The company flatly refused to agree (A 228). Beckerman, who appeared as a government witness, told his clients that the absence of a written agreement rendered any "guarantee" unenforceable, but -- despite his recommendation that his clients refuse to buy the property -- his clients rejected his advice and went ahead with the deal (A 229,230).* Beckerman wrote to his clients in an extensive closing statement that the sellers expressly declined to indemnify the buyers if the above restriction was not removed.

* At trial, Yanowitch denied having given Raseac any promise -- on his own behalf or Homex's -- of getting them out of the transaction if the land proved unsuitable for a shopping center (4458). The possibility of such a guarantee is further discounted by Shapiro's own testimony that Yanowitch did not even assure the purchasers that Gulf Oil would pick up the option on a corner lot (A 218-20), which it ultimately did in January, 1970.

Although the prosecution maintained that the initial Raseac transaction was a sham effected by a secret promise, the testimony of its own witnesses indicates an arm's length transaction in which the purchasers were paying fair value. The only evidence directly bearing upon the value of the land was an independent appraisal, which was part of Harris Kerr Forster's original work papers and part of a government exhibit, which estimated its value at \$403,650, just \$22,000 less than the purchase price (A 319; E 382). This land was not "raw farm" but was zoned and had water improvements nearby. Moreover, the government's own witnesses confirmed that the alleged indicia of fraud -- a shell corporation as purchaser, a down payment of \$80,000 (20%) and a purchase money mortgage securing the balance of the purchase price -- was typical of a transaction involving undeveloped real property (A 222, 223, 226; cf. A 248a).

By February 1971, Falcone had grown dissatisfied with his partners' lack of efforts in developing the property, and neither he nor his partners wished to continue making the mortgage payments (A 267-69). The zoning restriction had not been removed, and he asked his attorney (Yanowitch's former law partner) Bernard Frank, Esq., to contact Yanowitch and tell him to find someone to take over the property (A 269, 270). Frank, called by the prosecution under a grant of immunity, testified that when he spoke to Yanowitch in March 1971, that Yanowitch had said he would "try" to get them out of the property in a year but that

he had been preoccupied with other matters (A 270-71; E 407). He also stated that "the Stirlings were really criticising him because here he had put together a deal with respectable businessmen a year, a year and a half ago and it was falling apart" (A 271). Frank further testified that Yanowitch then asked him whether he and his partner, John Garrity, would be interested in buying the property from Raseac (A 272-73).

At first, Frank told Yanowitch that he and Garrity had not been having a good year, and that they probably could not come up with the cash necessary to close the deal, and Yanowitch suggested that the deal was so advantageous that it was worth borrowing money (A 273-74). After Frank discussed the deal with Garrity, they obtained a loan from Central Trust, which had previous dealings with the law firm and had already issued a mortgage to Homex on the property, and bought the property from Raseac in March, 1971 (A 274, 276-77, 286-90). Despite the prosecution's attempt to depict the sale as a sham transaction, Frank testified that he and Garrity would not have entered into the transaction -- regardless of the past association with Yanowitch -- if the property was not worth it (A 280, 281-82).*

*At trial, Frank had testified that part of the "inducement" for the transaction had been Yanowitch's statement that Homex would, should the occasion arise, release several acres of the property from its mortgage so that Frank and Garrity could generate cash to make periodic payments on the Homex mortgage (A 272-73). On cross-examination, Frank admitted that no such release had been provided by Homex or Yanowitch and that he and Garrity did not rely upon any such representation (A 283-85).

During the course of his direct examination, Frank suggested that when he had initially mentioned the bad year which he and Garrity had been having, Yanowitch said "Don't worry about that, we're going to be sending you so much legal business that this investment will never be a burden on you and [Garrity]." (A 274-75). While Garrity & Frank's billings to Homex subsequently increased, the connection between the Raseac transaction and their billings was never established; Frank testified that all of the services for which Homex was billed were actually performed, and that there was nothing whatsoever spurious about Garrity & Frank's charges (A 296-97, 300-06). In answer to the only question which bore directly upon the prosecution's attempt to depict a pay-off, Frank -- an immunized witness called by the government -- flatly stated that Yanowitch had never "directly or indirectly" told him to pad his bills (A 306).

As to the Stirling brothers, Frank stated that he never discussed either the Raseac transaction, his firm's hourly rates, or the amount of its bills with either of them (A 307). Indeed, the only context in which the Stirlings were ever mentioned was the statement, attributed to Yanowitch, that they were "criticizing [Yanowitch] because here he had put together a deal

with respectable businessmen . . . and it was falling apart" (A 271; see also A 310) -- a criticism which would hardly have been made with respect to a sham transaction.

Moreover, the entire Raseac transaction was effectively discounted by William Murray, the member of Peat Marwick Mitchell who was in charge of the Homex engagement. Testifying as a government witness, Murray stated that "the only fact that might have concerned me [about the propriety of the Raseac receivable] was the increased legal fees, whether these things were in fact as a result of increased activities or just inflated billings." (A 407-08). Since Frank had himself testified that the billings were bona fide, there was no reason to question the transaction.

(b) 57 & 31 Development Corporation

In December 1970, Harold Wynn and William Grago, partners in the Empire Pipeline Corporation, and Carmine Grasso, their

attorney, met with David Stirling to discuss their possible acquisition of acreage at the junction of Routes 57 and 31 in Clay, New York. Actually, the impetus for this meeting came from Wynn, who had heard a conversation between Robert Congel, the leading shopping center developer in central New York, and Carl Wren, a Homex Vice President, in which Congel expressed an interest in buying the property (A 243-47). Empire Pipeline had been working on several Homex projects, including land contiguous to the acreage, and Stirling "felt that we were the logical ones to acquire this particular piece of property" (A 232).^{*} A 30-acre portion of the property was then the subject of a condemnation proceeding, and Stirling told them that he anticipated -- as it turned out, correctly -- that the State would award as much as \$1 million for that property (A 234, 236, 248, 250). Stirling stated that the property was worth at least \$2.1 million, and that Kabeth would sell it to them for that price because Homex "was disposing of commercial properties [because] they wanted to be known as housing manufacturers rather than real estate developers. . ." (A 232).

^{*}As to the charge that Empire Pipeline "had derived a material portion of its past revenues" from Homex (Ind., ¶12, A 14-15), the testimony was equivocal. While Wynn testified that 40% of Empire's volume came from Homex, his partner stated that, while it had previously amounted to that 25%-40%, by 1970 "it was not a great deal" (A 231,249). Significantly, the government produced no documentary evidence to support its implied claim that Empire was financially dependent on -- or even expected future revenues from -- Homex. Grago himself noted that pipe contracting companies normally had customers with as much as 25-40% of their trade when projects are actually under construction (A 258).

Wynn stated that, while the price was fair, he, Grago, and Grasso could not handle a \$2 million deal (A 235, 251). Stirling explained that the anticipated condemnation award could go to the reduction of the purchase price, and that he would permit a 10% (\$210,000) down payment and no payments of principal for five years (A 236). Wynn testified that when he suggested that for the time being they could not come up with \$210,000 in cash, Stirling also offered to arrange financing for them (A 236). Wynn and his colleagues discussed the deal and "we concluded that this would be a very profitable undertaking. . ." (A 237). The deal was accepted that day by Wynn, Grago and Grasso without even a private conference between them (A 237). The anticipated condemnation award was assigned to the First National Bank of Rochester as security for repayment of the mortgage.

At trial, the government contended that "such 'sale' involved side promises and agreement given to the buyers including guarantees against losses" (Ind., ¶12; A 14-15). Their own witnesses, however, failing to provide any support for a guarantee from Homex. Thus, Whnn testified that after the bargain had been struck, "[David] extended his hand to me and said, 'Bud, you wont' get hurt by this deal'" (A 237a). At no time did Wynn ever claim that David Stirling had "guaranteed" anything. His partner, Grago, who claimed that Wynn had done all the talking for them, recollected that "David said there could be no corporate guarantees" but he would personally guarantee that we would not

be hurt, and we shook hands on that". (A 252, 256-57).*

If Grago or Wynn ever thought that there was a guarantee, the subsequent financing of the transaction must have relieved them of that misconception. Before the First National Bank of Rochester would issue 57 & 31 Development Corporation a \$250,000 loan, it required their personal guarantees on the note (A 265-66; E 378-79, 394-406). While the indictment charged that 57 & 31 was "a financially weak shell corporation", the net worth of Grasso, Grago and Wynn amounted to \$98,719 as of the December 23, 1970 contract date -- four times the amount of the note and roughly equivalent to the sale price of the land (less the anticipated condemnation award) (A 263-64; GX 56).

After the contract had been prepared, Yanowitch asked Reuben Davis, a Homex attorney, to call Professor Joseph A. Mauriello, of the New York University School of Business Administration, who served as Homex's consultant on accounting matters. According to Davis, who testified as a government witness, Yanowitch asked him to state the broad outlines of the contract and to get his opinion as to whether it was a bona fide sale (A 312-14). Significantly, Davis did not claim that any instruction had been given to him to withhold information from Mauriello, and, as the lawyer who drafted the contract, he gave a full report to Mauriello (A 311, 312, 14; GX 580 [9090771]). During

*It is noteworthy that Grago had taken the witness stand after having had the benefit of hearing Wynn discuss his testimony with Grasso over the telephone (A 254-56). Significantly, attorney Grasso -- who would certainly know the difference between a guarantee and a handshake -- was not called by the prosecution.

January and February, 1971, Mauriello and, after the retention of Peat Marwick, William Murray, reviewed the transaction and concluded that it could be recognized as income (A 348-60).

There is no evidence that the Stirlings or Yanowitch ever withheld any information from the accountants, or directed anyone else to withhold information.

During this period, Davis had been told by Mauriello that the five-year deferral of payment of the principal would cause the imputation of interest, thereby reducing the income to be recognized on the sale (A 398-99). In late January 1971, the agreement was amended to provide that 57 & 31 would make annual payments of \$50,000 on the principal (A 238-42; GX 56). Wynn testified that David Stirling had assured him that he would not have a cash flow problem because Homex work on adjacent projects would be picking up and, as the Clay area developed commercially, he would be able to sell off enough of the land to handle the principal payments (A 242).^{*} There is no testimony that Stirling -- who, according to Grago, had never offered a guarantee from Homex -- in any way promised to send Homex work to Empire to help it pay for the property.

As amended, the 57 & 31 transaction was disclosed and reported in the Merrill Lynch preliminary prospectus (A 413-19;

^{*} Grago and Wynn made the first principal payment from funds derived by having Empire Pipeline bill Homex directly, rather than through Empire's subsidiary, Leasing Equipment Company (A 253-53a; GX 942). Grago testified that there was nothing surreptitious or devious about this billing, and that it represented payment for services which had actually been performed for Homex (A 259-61, 264a-264b).

DX 759). It was not included in income at all in the final Merrill Lynch prospectus (E 81).

At trial, Murray and Mauriello testified that they had not known of Homex's assignment of the condemnation award to First National, and that they would have changed their respective opinions had they known about it (A 366, 367, 403-06). Of course, there was no testimony indicating that such information was withheld from them, nor that David Stirling, who signed the Homex representation letter prepared by the accountants, was aware of the fact that the accountants would consider such an assignment to a third party as an "indirect relationship" between Homes and 57 & 31 Development Corporation (A 406).

(c) Kece Associates

Prior to the formation of Homex, the Stirlings had sold the Hollyrood Park complex to a limited partnership headed by Peter Thun, and retained a 12% interest in that partnership (A 381-82). As part of the acquisition, the partnership had retained a right of first refusal with respect to the adjacent parcels, which the Stirlings subsequently conveyed to Homex subsidiaries (A 392, A 446-47). In May 1969, David Stirling had advised Thun that the parcels were being offered for sale, and inquired as to whether he would be interested in purchasing them. Thun had a real estate consultant inspect one parcel as a possible shopping center, and told Stirling that he was not interested in it (A 383-84).* The other parcel, however, was highly

* This parcel was subsequently transferred to Raseac Realty (see supra, pp. 15-20).

desirable, both as a possible "third phase" to Hollywood Park and equally important, as protection for the \$7 million which Thun had already invested in the Hollywood complex: "Hollywood was planned as a parcel including that land and some of the access roads to some of the [existing] buildings run over that land, and the boundary to that land runs just a few feet from the front door of several of the buildings." (A 384, 393-94).

Thun, called as a prosecution witness, testified that in that same conversation he had asked how much it would cost to put 330 Homex units on the parcel, and Stirling told him that he could not answer the question because no price list had been published (3093-94). Thun then said that because he could not estimate the cost of developing the property without the price of the modules, "the purchase of the land would have to be on a basis whereby it had more the characteristics of an option on the [raw] land as far as I was concerned." (A 385). As the transaction was ultimately structured, Kece Associates, Ltd. purchased the property for \$325,000, making a cash down payment of \$32,500 and giving a mortgage for the balance of the purchase price, secured only by the property itself (A 386; GX 74). In September, three months after the closing, Kabeth sent a letter of intent to Riverbend Estates, Inc., another Thun corporation to which the parcel was transferred from Kece, in which it agreed to provide 330 units for installation on the property at published prices conditioned upon financing (A 387; E 380-81). After

this deal was closed, Thun stated, he told his partners in Hollyrood Park -- but not the Stirlings -- that the developed land would be sold to the partnership for what it had cost him (A 387-89).

In its closing argument, the prosecution claimed that this sale was really an option, and that the Kabeth letter was a "letter of intent [and] part and parcel of, despite Mr. Stirling's testimony otherwise, the sale of that land to Peter Thun. . . ." (A 551). The facts -- from Thun's own testimony -- rebut any inferences supporting this charge.

To begin with, Thun himself stated that the transaction "was an absolute outright purchase of [the property]", and that, when he bought it in May 1969, he intended to develop it and add it to Hollyrood Park (A 395). Indeed, Thun's position was such that, even if he did not put up any modules, he would have secured its purchase "because of their adjacency to [my] large investment" -- \$7 million -- "and because that which was put on them would have definitely affected the character of [Hollyrood Park] itself." (A 394). Moreover, the fact that the mortgage could not be enforced against Kece Associates was meaningless: Kece was never shown to have any assets, Thun had ample reason to continue the mortgage payments, and the land itself had been appraised at \$310,000 (E 382). At the time that the sale was made in May 1969, the balance due was amply secured by the land itself. Similarly, the alleged

"obligation" to put 330 modules on the property is belied by both the document itself and the surrounding circumstances. The Kabeth letter was not even executed until more than two months after the deed had been transferred to Kece (Bill of Particulars, p. 14 [A 109]). Moreover, the terms of the letter amount to no more than an agreement to agree, on 330 modules which had been neither designed nor priced (E 381-82).

The prosecution devoted most of Thun's testimony to establishing that, despite having confirmed the validity of Kece's debt to Peat Marwick, the mortgage payments were induced by transactions in which David Stirling transferred his remaining interests in certain limited partnerships to Thun. In the end, the only thing which the prosecution had established was that a September, 1970, payment was made by a check from Jack Doerge, who had bought part of both Stirlings' and Thun's stock in Mobile Towns, Inc. (A 396-97). Curiously, Thun's testimony on this point is:

"Q. Did you take out your checkbook and write a check for \$90,000?

"A. No, I did not." (A 396)

This statement ended up in the prosecution's summation as:

"Mr. Thun, did you ever take out your check book and pay \$90,000 or \$23,000 or two cents against this debt?

"He said no, he didn't. That speaks volumes about whether that was truly a receivable that was going to be collected. . ." (A 555-56)

It is submitted that the prosecution's confusion about its witness's testimony "speaks volumes" about whether the jury truly understood the issues involved in the real estate transactions.

Stock Purchases for Union Officials

In June 1969, Homex entered into a labor agreement with the United Brotherhood of Carpenters and Joiners of America (A 448). All of the government witnesses testified that this was an arm's length agreement fairly negotiated (A 192, 484-85). When Homex first went public on February 19, 1970, the importance of satisfactory labor relations was prominently mentioned on the third page of the prospectus and the possibility of adverse labor relations was explicitly set forth:

"Freedom from work interruptions as a result of labor problems is important to the continued success of the Company's business. Although the Company believes that the above-mentioned agreements should contribute to the continuation of its present satisfactory labor relations, it can give no assurance that the Company and its subsidiaries will be free of labor problems in the future." (E 51-52) [emphasis added])

The prosecution charged that a similar statement in the prospectus (E 90) failed to disclose that David Stirling, after the initial public sale of Homex stock, had arranged for the payment of loans made to various union officials by the Central Trust Company of Rochester (Ind., ¶16 [A 17]). Defendants' pretrial motion to strike this count, pursuant to F.R.Cr.P. 7(d), had been denied (A 24-32).* At no time has the government ever sought to explain how a registration statement highlighting the transience of amicable labor relations could mislead anyone.

*Before trial David Stirling and Yanowitch had pleaded, respectively, guilty and nolo contendere to a misdemeanor in the Western District of New York involving violation of the Labor Management Act in connection with these purchases. Prior to trial, they had moved to vacate their pleas and no decision has yet been issued on that application. Over strenuous objection, the trial court permitted the prosecution to use those previous pleas during the cross-examination of Stirling (A 459-68).

Kenneth Langone, a former president of Pressprich, called as a government witness, testified that shortly prior to the offering -- and six months after the labor agreement -- David Stirling had asked for the inclusion of certain individuals among the hundreds on the original stock issue list, and had informed him that "these were the people that were representatives of the labor unions" (A 175, 180). Langone told Stirling that it was not "appropriate", and David Stirling dropped the subject (A 175-76). In point of fact, no Carpenters' Union official ever purchased Homex stock at the original issue price of \$16.50 per share.*

Langone testified that in March, 1970, David Stirling had asked him whether the union officials had received stock and was told that they had not. He also said, however, that Stirling asked whether it would be proper if they were to purchase stock at the after-market price of \$34 per share. Langone claims to have told Stirling that it would be no problem, and to have proceeded to purchase the stock at that price (A 177-79). Charles Marshall, then an officer of Central Trust Company (and later president of U. S. Shelter Corporation, a Homex subsidiary) claimed that David Stirling had arranged loans by Central Trust to finance these purchases, and had personally guaranteed their repayment at the time that the loans were made (A 325; E 418 [forged guarantee letter]).

*Notwithstanding this uncontested fact, the prosecution introduced an internal legal memorandum which dealt with the question of whether Homex could legally offer stock subscriptions to labor union officials, bank employees, and government employees at the original issue price (GX 710). Nothing in the memo said that it would be a violation of any securities law or the Labor Management Act. Significantly, there was ample evidence at trial that such persons had themselves initiated such inquiries. See, e.g., A 187-89 [Ruggiano]; A 449, 450.

David Stirling denied having either requested the stock purchases or having guaranteed the loans (A 454, 457). Moreover, he noted that Homex director and labor expert Theodore Kheel was intimately familiar with every aspect of Homex's labor relations, had told him that such purchases would not have been unlawful -- an opinion he held "very strongly" -- and Kheel himself designated various union officials to receive Homex stock, several of whom, including Joseph Lane Kirkland, had appeared on one of Marshall's lists of guaranteed loans (A 451-53, 456).

The heart of this aspect of the case, as it went to the jury, was how the labor union officials had come to receive their Homex stock, whether David Stirling had guaranteed the loans made to the union officials, and whether defendants had made payments on the loans at Central Trust. The case against defendants on these issues was largely decided by essential witnesses whom the prosecution did not call, viz, Csapo, Sasso and an unknown note teller, a key defense witness who was not permitted to testify, and a disputed guarantee letter (GX 291 [E 418]) which even the prosecution's expert conceded to be a possible forgery.

Of the six labor officials who were called by the prosecution, five explicitly stated that they had no discussion with either the Stirling brothers or Mr. Yanowitch about purchasing Homex stock (A 182-84 [Livingston]; A 198-99 [Marsh]; A 201-02 [Jacobs]; A 205-06 [Konyha]; A 209-10, 211-12 [Catalfano]). Only Samuel Ruggiano testified to any contact with the Stirlings about the stock, and his testimony made no reference as to whether

the Stirlings' suggestion that "I ought to buy in" related to the initial issue, the aftermarket, or three years later (A 187-88).^{*} Moreover, Ruggiano himself testified that he had no dealings with either David or William Stirling in connection with Homex stock, that he did not even know Harold Yanowitch, and that his decision to purchase the stock had largely been based upon his experience with the Homex product -- "it was the finest" (A 193, 201-02). Not one of these labor officials claimed to have given Homex special treatment by reason of such stock ownership (A 183, 190-91, 203-04, 208).

To the extent that these union officials had any dealings with Homex executives in regard to stock ownership, they were confined to Frank Csapo, a vice-president in charge of production (A 185-86, 189, 194-98, 207). The testimony of prosecution witnesses Catalfano, who had asked Csapo to put him in on the initial offering, hardly suggested any impropriety: "at

^{*}The equivocal nature of Ruggiano's testimony at A 187-88 should be compared to the prosecution's rebuttal summation, which contained the statement that

"William Stirling was active in the plant. You can see that partially from the fact that Samuel Ruggiano testified that he had a conversation with William Stirling and David Stirling about buying Stirling Homex stock; that they were urging it on him, pushing it on him back in the spring of 1970." (A 556e-f)

The "push" came from the prosecutor's zeal, not Ruggiano's testimony, and if it came in the spring of 1970, it was certainly not an invitation to get in on the original issue of February 19, 1970.

one time he indicated that he thought we were going to get it. Then he said, 'I'm sorry, I can't promise you nothing'" (A 207). Moreover, David Stirling testified that he had never instructed Csapo to offer Homex stock to union officials (A 453). Mysteriously, the prosecution never called Csapo as a witness, despite his central role in the testimony of the union officials.

To fill in this gap, the prosecutor relied upon the testimony of rebuttal witness Kheel, who claimed that while he had designated various union officials as recipients of Homex stock at the initial offering price, none of them had been members of the Carpenters' union (A 479-80). He also denied having had any discussions with David Stirling about such designations, and claimed to have no knowledge of the purchases made by Messrs. Campbell, Livingston, Ruggiano, Konyha, Marsh, Jacobs and Catalfano (A 480-83). However, he admitted that he had arranged for the purchase of several thousand shares of Homex's stock for some undesignated "friends" (A 489-90; E 491). These, however, did not include Joseph Lane Kirkland -- one of the purchasers whose loan was allegedly guaranteed by David Stirling -- or Peter Turzik, who he recalled as "an official of the Carpenter's union who retired. . .some time in this period. . ." (A 488, 490-92).

Kirkland, called by defendants in surrebuttal, testified that Kheel had not only arranged for the purchase of his Homex stock -- after receiving Kheel's assurance that it would not be a conflict of interest -- but that he had executed a blank promissory

note for the purchase price in Kheel's office (A 495-500; GX 866).*

When this note was filled in, the purchase price -- \$58,300 -- was equal to the note allegedly guaranteed by David Stirling (GX 291 [E 418]). On cross-examination, Kirkland admitted that he had never been a member of the Carpenter's union (A 500).

In summation, the prosecution made this fact the cornerstone of Kheel's credibility, inviting the jury, "if Mr. Gaynor [Stirlings' trial counsel] stands up here and starts looking at you in the eye and talking about Lane Kirkland", to tell him that Kirkland was not in the Carpenter's union (A 552-53).

Of course, the prosecution could afford to engage in this type of bravado because the trial court had refused to let Peter Turzik, a Carpenter's union official, testify in surrebuttal that, Mr. Kheel's recollection notwithstanding, he also had been designated by Kheel for the Homex stock offering (A 493-94).

With respect to the alleged guarantee of the Carpenter's union loans, Marshall testified that David Stirling had asked him to lend some individuals money for the purchase of the Homex stock, which loans he would personally guarantee (A 325, 331).

Of course, Marshall had not always been so certain of this fact: in his testimony before the SEC, Marshall had denied that Stirling or Yanowitch had given him any guarantee for the loans, and merely

*Kheel had admitted that when he joined the Homex board he had "sort [sic] out Mr. Kirkland [an AFL-CIO official] to speak to him about the question of the attitude of the building trade towards manufactured housing", and Kirkland had introduced him to the president of the Carpenter's union (A 486-87),

said that "Probably one of them called me and asked me to loan so-and-so money and I said yes." (A 333-34, 339). The handling of the loans had been most peculiar, since the earliest evidence of the presentation of those loans for approval were the minutes of the Executive Committee's weekly meeting of January 26, 1971, more than ten months after the alleged phone call between David Stirling and Marshall (A 341-42, 344; GX 1043). Marshall did not attempt to explain such tardiness, nor did he account for the fact some of the loans were not even evidenced by signed promissory notes (A 343-44). As the inconsistencies piled up Marshall admitted that he did not know the details of how the loans had been processed, because another Central Trust officer, Donald Sasso, Marshall's assistant, had taken care of the loans and "is the one who has all these details and knowledge" relating to David Stirling and Yanowitch's involvement in their processing (A 335-37). However, Marshall had not made any effort to find out about these facts from Sasso, and the prosecution never called Sasso as a witness.

However, the prosecution did produce a purported guarantee letter, dated June 26, 1970, in which David Stirling allegedly guaranteed payment of the Catalfano, Jacobs, Kirkland, Konyha, Marsh, Livingston, Campbell and Ruggiano notes (E 418). Aside

from the fact that Marshall initially did not recall even the existence of the letter in his 1972 SEC testimony, he was uncertain as to whether he or Mr. Sasso had received it, or whether "Mr. Sasso ever ha[d] anything to do with [it]." (A 335, 338, 340). The only persons who approached that letter with any certainty were David Stirling, who absolutely denied having signed it, and defense expert Felix Klein, who testified that the purported signature was a forgery (A 428-34, 458). Neither the denial nor Klein's expert testimony were rebutted, as prosecution expert Charles Spitzer testified that he was unable to determine whether or not David Stirling had actually signed GX 291 (A 478).

Finally, the prosecution maintained that the Stirlings and Yanowitch had made interest and principal payments on the notes by having Homex chauffeur William McCann cash checks issued for "phony expense vouchers" although real expense vouchers were testified to by Clayton, Stirling and Yanowitch. No witness was called by the prosecution to establish that the vouchers were "phony". However, McCann's own testimony was quite precise -- he brought the cash back to Mr. Yanowitch -- and neither he nor anyone else testified that the cash was then brought back to Central Trust for deposit against the loans (A 174). It is interesting that while the government's theory could have been bolstered by the testimony of Central Trust's note teller, who would presumably have remembered such an unusual series of deposits, the note teller -- like Csapo and Sasso -- was never called to testify.

The Mississippi Project

In the course of its expansion, Homex sought out new markets for operation in late 1970 and early 1971. Mississippi was one selected. In December of 1970, Rubel Phillips, then a Homex attorney, helped organize a non-profit group of local citizens to make application for federal, state and locally financed housing projects (GX 120). The non-profit group was entitled the Greater Gulf Coast Housing Development Corporation ("GGC"). In December, 1970, GGC and Homex entered into two agreements for the development of modular housing in Mississippi. The first agreement for \$100 million called for the construction of 5,000 dwelling units over a 6-year period conditioned on the modules being constructed in a Mississippi plant. The second agreement entered into by Homex was a \$15 million contract between GGC and Homex for the construction of 800 modular housing units.

Most of this aspect of the case stems from the inclusion of sales income and receivables from Homex's recorded sales of approximately \$8 million on the project relying on a letter to GGC from the Farmers Home Administration, a federal agency designed to provide low income housing for certain qualified farm residents. It was the contention of the prosecution during trial that this letter was forged by or through the friends of defendant Phillips, and the jury so found. However, the Stirlings and Yanowitch, having no basis for questioning the authenticity of the letter, relied completely upon it, never considering that anyone would have the audacity to fabricate a

government document of such sweeping proportion.

Phillips testified that a dispute later arose between defendants Yanowitch and Phillips as to where the modules were to be manufactured to comply with the \$15 million agreement. Phillips insisted that they were to be constructed in Mississippi and Yanowitch insisted on Avon. Yanowitch requested that Phillips obtain a release on behalf of Homex from this provision in order to finance it with the Farmers Home Administration. To resolve the issue, Phillips induced a representative of the GGC to sign a stipulation indicating the manufacture of the modules would be in Avon, while at the same time, unknown to Yanowitch, Phillips covertly entered into another stipulation with GGC on behalf of Homex whereby only modules manufactured in Mississippi would be installed in the Mississippi projects. The prosecution claims there was no disclosure in the 1971 Registration Statement of this restriction on the manufacture locations of the Homex modules for the Mississippi project. The fact is Phillips was guilty of duplicity, and the company innocently relied on his false statements.

Role of Harold M. Yanowitch

Harold M. Yanowitch was born in Rochester, New York, attended public schools and the University of Rochester. He served three years in the U. S. Army Air Corps, graduated from Harvard Law School under the GI Bill of Rights in 1948, returned to Rochester and became a practicing attorney in 1949. Shortly after that he was married and in due course became father of five children.

His general practice included small estates, preparation of wills and matters generally not related to major companies. He later formed a partnership with two other lawyers. Yanowitch was introduced to the Stirlings by Charles Marshall, a Rochester banker. He represented the Stirlings at real estate closings, drew up their wills and came to know them on a personal basis. He was generally inexperienced in the field of corporate finance.

In 1969, after Harold Yanowitch had represented the Stirlings for several years, they asked him to leave his practice and become a full-time lawyer and officer of their company. He accepted. Soon after joining Stirling Homex, he recognized that this was not a textbook-run business, but a new industry which required skilled expertise beyond his capacity. He sought and received authority from the Stirlings to organize a legal department with experts in specialized fields of law. He hired Reuben Davis, previously a Commissioner of Buildings in the City of Rochester and previously a judge there. Judge Davis had expertise in the field of non-profit housing and slum removal. Later he hired Thomas Santa Lucia, a former Assistant District Attorney in Rochester, who had experience working with local housing authorities. He added a former judge named Wilbur Trammell who had considerable expertise in dealing with the Federal Department of Urban Development and their complicated programs. In the field of securities law he hired Jerome Dienstag, an attorney in

New York City who specialized in that area. Dienstag had charge of all SEC matters, approval of press releases and continuously worked with the Shea firm. Later, he hired Charles Northrup, who had served in one of the larger firms in Rochester and who was an experienced corporate lawyer. All of these men were employed at Avon daily looking after the legal affairs of the Company.

Allen Kramer, Esq., a specialist in problems concerning the Securities and Exchange Commission and corporate law and a partner in the firm of Shea Gould Climenko & Kramer, was general counsel for the company from its inception. The legal problems which arose with labor unions in an expanding business were handled by Theodore Kheel, Esq. of New York City, a lawyer greatly experienced in mediating state and national labor disputes and who was hired by the Stirlings and became a member of the board of directors before the company went public. Kheel became labor counsel to Homex and prepared its international contract with the Carpenters' union. Kheel did all the labor work; Yanowitch had absolutely nothing to do with it, and never sat in on a negotiation or discussed them with him.

In the aggregate, Yanowitch put together a superior collection of outside counsel at an annual cost in the hundreds of thousands of dollars, in addition to the seven lawyers who operated as in-house counsel. Yanowitch was the in-house

administrator, coordinating their efforts but deferring to experts advice from outside and inside counsel to insure that the stockholders had the best legal counsel available.

At all times, the outside accountants and lawyers were afforded full range in the company and every fact or document requested was forwarded to them. In sum, the legal affairs of the corporation were under constant, microscopic review.

In fact, Yanowitch was a dedicated employee of Homex who never sold a single share of its stock, gained nothing personally as a result of the Homex offerings, and remained with the ship until he was asked to resign shortly before bankruptcy. He believed in Homex, trusted his fellow executives, and performed his administrative and legal functions well both in supervising the in-house staff and relying upon the expertise of nationally prominent accountants and lawyers.

The record is devoid of direct evidence to show that he intended to commit fraud, either individually or with others. He neither intended nor, in fact, made any personal gain from the various land transactions involved. He had no dealings with the union officials but relied entirely upon Theodore Kheel for that function. With respect to the government's commitment letter, he was simply taken in by Phillips as were every good accounting firm and law firm involved.

Yanowitch's guilt is predicated upon a flowover of evidence educed by the government in their efforts to find a scapegoat for the demise of Stirling Homex Corporation.

I

THE TRIAL COURT'S REFUSAL TO
STRIKE PARAGRAPH 16 OF THE IN-
DICTMENT VIOLATED YANOWITCH'S
RIGHTS UNDER THE FIFTH AMENDMENT
AND DEPRIVED HIM OF A FAIR TRIAL

Prior to trial, defendants David Stirling and Harold Yanowitch unsuccessfully moved to strike paragraph 16 of the indictment, which related to the purchase of Homex stock for officials of the United Brotherhood of Carpenters and Joiners of America (A 24-32). Five months prior to the issuance of the indictment below, Yanowitch had pleaded nolo contendere to an indictment alleging all of the purchase and loan transactions which were tried herein, and had been fined (A 53-72, 74). The trial court's failure to strike this paragraph violated two fundamental rights guaranteed to Harold Yanowitch by the Fifth Amendment, the privilege against self-incrimination and the prohibition against double jeopardy. Even more basically, this part of the case could never have been proven, in fact never was proven, and only served to inflame the jury by the injection of what the court itself characterized as "a separate substantive item in a case of this nature" (A 473).

Paragraph 16 charged, in full text, that:

"16. It was further a part of said scheme to defraud that on or about July 29, 1971, defendants DAVID STIRLING, JR., WILLIAM G. STIRLING, and HAROLD M. YANOWITCH prepared and filed with the SEC registration statements [the Merrill Lynch prospectus] and other reports which described Homex's several relations with the United Brotherhood of Carpenters and Joiners of America and its locals. Those statements were materially false and misleading, because as the defendants well knew, but failed to disclose, seven members and officials of the United Brotherhood of Carpenters and

Joiners of America had been paid off by having approximately \$240,000 worth of Homex common stock purchased for them at approximately \$76,800 less than the fair market value, and afterwards, when the fair market price had fallen, approximately \$64,000 worth of Homex common stock sold for them at approximately \$136,000 above the market price." (A 17)

In essence, the prosecution contended that purchasers of Homex's preferred stock should have been advised that its peaceful labor relations were predicated on bribes to union officials, lest they assume that Homex would be free of labor strife because of its existing contracts.

This argument should never have been permitted, since no investor could have reasonably relied on such continued harmony in light of the statements in the Merrill Lynch prospectus that Homex's present collective bargaining agreement would expire within two months, and that "while it does not expect any difficulty in negotiating such [new] contract, it can give no assurance in this connection." (GX 12 [E 135]). Furthermore, putting aside the patent lack of materiality, the evidence offered by the prosecution at trial failed to bear out the allegation: not one union official testified to having secured any special or unusual benefits for Homex.* Given the fact that there was not a scintilla of evidence that Homex enjoyed labor peace because of these alleged pay-offs, their disclosure in the prospectus would probably have been more misleading than their omission.

* Indeed, the only evidence which the prosecution offered to prove any benefit to Homex was a letter from Stirling's defense counsel in connection with the prior proceeding, which letter Stirling had neither seen nor authorized (Tr. 4135).

Moreover, the prosecution of Harold Yanowitch for having failed to make such disclosure violated the principle, espoused in Marchetti v. United States, 390 U.S. 39 (1968), that the Fifth Amendment precludes prosecution for failure to disclose such conduct as would subject the person making such disclosure to criminal prosecution. In the Marchetti case, defendant had been convicted of willful failure to pay the federal wagering tax, failure to register, and conspiracy to evade payment of the tax. This Court rejected Marchetti's claim that the statutory obligation to register and pay the tax violated his privilege against self-incrimination. See 352 F.2d 848.

The Supreme Court, in reversing this Court, noted that the effect of the registration requirement was nothing less than a mandate to expose himself to criminal prosecution:

"[Marchetti] was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt."

--390 U.S. at 48
(footnotes omitted)

See also Grosso v. United States, 390 U.S. 62 (1968).

Harold Yanowitch's predicament, vis-a-vis the alleged pay-offs to union officials, is no different than Marchetti's predicament: if he were to disclose such payments, he would be prosecuted under the Taft-Hartley Act or numerous state statutes relating to commercial bribery; because he did not disclose such payments, he has now been convicted of violating the Securities Act and the mail fraud statutes.

The irony of such a result in this case is even more striking, however, because Yanowitch has already been punished for such Taft-Hartley violations in the Western District of New York, under an indictment which covered the same transactions and individuals educed at trial with respect to paragraph 16 of this indictment. By permitting the jury to deliberate over these charges, the trial court placed Yanowitch within "the classic mold of being twice placed in jeopardy for the same offense." (United States v. Jorn, 400 U.S. 470, 488 [Burger, C. J., concurring]), cf. United States v. Mallah, 503 F.2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1976).

Given the dubious materiality of the alleged non-disclosure and the palpable danger to Yanowitch's Fifth Amendment privileges, the trial court should have stricken paragraph 16 prior to trial. Indeed, by denying the motion to strike, the court permitted the prosecution to introduce a peculiarly inflammatory matter into this case which is of a markedly different nature than the other specifications alleged -- not a fraud against the purchasers of Homes stock, but a crime against labor; not an inflation of Homex's reported earnings, but the evil tendencies of its bribe-giving principals; not a failure to disclose past losses, but an alleged failure to account for its successful labor relations. Under these circumstances, the charge relating to the alleged payments to union officials should have been stricken. See, e.g., United States v. Saporta, 270 F.Supp. 183 (E.D.N.Y. 1967); United States v. Bonanno, 177 F.Supp. 106 (S.D.N.Y. 1959).

II

THE COURT'S CHARGE TO THE JURY WITH RESPECT TO RELIANCE UPON EXPERTS WAS ERRONEOUS

In large part, the specifications alleged against Harold Yanowitch reflected more upon his sophistication than his honesty. Thus, the issues framed by the prosecution, insofar as they related to the land transactions, turned upon such abstruse questions as whether Homex and 57 & 31 Corporation were "indirectly related" because of the assignment of the condemnation award. Similarly, the determination of specification 13 centered around Schulz' understanding of the term "reassignment," and whether that interpretation was shared, or even understood, by the SEC. Likewise, the alleged "guarantee" involved in the Raseac transaction, if it existed, would involve the issue of whether an undertaking barred by the Statute of Frauds was nonetheless a binding agreement to the SEC.

To be sure, all of these and other issues might have been immaterial if the testimony had not pulled the jury into areas requiring some degree of legal and financial sophistication, or if Yanowitch had held himself out as skilled in securities law or accounting. However, the evidence at trial indicated that in over twenty years of private practice, Yanowitch had only worked on one public offering prior to Homex, and neither the extent of his participation nor the complexity of that offering were ever demonstrated (A 181).

From the start, Homex and Yanowitch sought out and retained the acknowledged experts in their respective fields, such as Theodore Kheel, Allan Kramer, Harris Kerr Forster, and, subsequently, Peat

Marwick Mitchell. The record is devoid of any instance where Yanowitch did not follow the recommendations given to him by his outside experts, or any testimony that they were denied access to any materials or information they had requested. Instead, the prosecution's case largely centered around the testimony of Messrs. Kramer, Murray, Mauriello and Kheel, that their opinions were based on facts which had not been disclosed to them and that, had they known such facts, they would or might have given different opinions.

This sort of testimony hardly meets the issue posed by the scienter requirements of the statutes under which Yanowitch was tried. If he had candidly and truthfully answered every question asked of them by their experts, who presumably knew what questions had to be answered, he was entitled to rely on those answers unless they were so patently erroneous as to permit the jury to speculate on the Stirlings' good faith in relying upon them.

Unfortunately, the charge to the jury did not reflect the possibility that Yanowitch had either fallen into the hands of experts whose professed ignorance resulted from their own failure to seek the information they required, or to conform to professional standards with respect to SEC matters or proper auditing procedures. Rather than giving the charge requested by both the Stirlings and Yanowitch, the trial court charged, with respect to reliance upon expert opinion, that:

"If an attorney or accountant has a full account of the facts of what you are doing and what you intend to do is proper, it is lawful, your proceeding on that basis might serve as a strong indication that you were acting in good faith and not in bad faith."

"On the other hand, you will realize that if some of the important facts are misstated to the accountant or lawyer or if some of the important information is withheld or not disclosed, the advice that the accountant or lawyer then gives can hardly be deemed to constitute a basis for claiming good faith in going ahead and acting on the basis of that uninformed and insufficiently implemented advice." (A 601-02)*

This excerpt, the only portion of the charge addressed to reliance upon experts, failed to encompass the possibility that the "important information" which Yanowitch did not disclose was not "withheld," except in the sense that neither Allan Kramer, Peat Marwick, nor Theodore Kheel -- a Homex director before the company went public -- simply did not bother to pose the questions that should have been asked.

As the case was thus sent to the jury, it is likely that they could have completely disregarded Yanowitch's professed reliance

* With respect to reliance on experts, the Stirlings and Yanowitch had jointly requested the following charge:

You should ask yourself whether it would be likely that he would have personal knowledge of the fact he related or whether it was more likely that he obtained his information second-hand in reliance on the statements and opinions of others who were closer to the pertinent affairs of the company. For example, even if you find that a financial statement which a defendant mailed, or caused to be mailed, was false as charged, if you find that the defendant relied in good faith on the expertise of the accountant who furnished the statement and that he therefore personally believed the statement to be truthful, you must acquit the defendant charged with fraud in that instance.

simply because the persons they relied upon had, unknown to Yanowitch, done shoddy work. It is submitted that such an instruction was erroneous and highly prejudicial. See, e.g., United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), cert. denied sub. nom. Mittelman v. United States, 368 U.S. 984 (1962).

In the Crosby case, this Court reversed the conviction of brokers who had relied upon the advice of securities counsel in connection with the sale of unregistered securities, even though the attorneys giving the opinion had not been given all the facts essential to its determination. This Court, in terms equally applicable to the case at bar, noted that:

"The statutory and administrative regulatory scheme over this area is far from a model of clarity; such a situation is aggravated when, as here, criminal liability is based on the failure to comply with the law. We think it is all too facile an answer for the government to rely on the experience and supposed expertise of these brokers; the fact is that they purported to rely on opinion letters of an attorney, whose expertise is presumed to be even greater."

-- 294 F.2d at 942

The mere fact that Yanowitch is an attorney does not relieve the government of establishing a criminal intent to violate the law. See, e.g., United States v. Koenig, 388 F.Supp. 670, 712 (S.D.N.Y. 1974).

In its charge, the district court apparently relied (at the prosecution's suggestion) upon this Court's statement in United States v. Falcone, 544 F.2d 607 (2d Cir. 1976), a bankruptcy fraud case in which defendants, in 1974, had entered a false credit against a customer's account as a rebate for defective, "fishy"-smelling

cheese which had been delivered to the customer no later than December 1971. In responding to defendants' argument that they could not possibly be convicted because their attorney and their accountant had both told them "that it would be permissible to take a credit in 1974 for deliveries of foul cheese made in 1971", this Court wrote:

"Appellants do not question the correctness of the court's jury instruction that appellants' reliance upon expert advice should be considered a circumstance disproving fraudulent intent only if the jury found that the advice was given after full disclosure of all relevant and material facts."

-- 544 F.2d at 610, n. 6

Of course, in the Falcone case the "relevant and material fact" was that the "fishy cheese" story was a complete fabrication.

It is patently clear that holding Yanowitch to the standard imposed by the charge -- all of the "important information" must be disclosed or there can be no good faith reliance -- is unrealistic in an area where skilled accountants, lawyers, and SEC Commissioners often differ amongst themselves as to what constitutes "important information." It totally discounts the possibilities of both innocent misstatement or omission, or professional neglect. In the circumstances of this case, where Yanowitch had actively sought out the best professional advice, had never countermanded their directions and did not make a move without consultation, the court's charge was erroneous and prejudicial.

III

CERTAIN SPECIFICATIONS, UNSUPPORTED BY
THE EVIDENCE AND/OR BARRED BY THE FIFTH
AMENDMENT, SHOULD HAVE BEEN WITHDRAWN
FROM THE JURY'S CONSIDERATION

At the conclusion of the case, Yanowitch's counsel submitted a supplemental request to charge, which requested an instruction prohibiting the jury from considering the 57 & 31 and Kece Associates real estate transactions with respect to paragraphs 10, 11 and 12 of the indictment, and the income misstatements relating to installation revenues, U. S. Shelter's fee in connection with the Greater Gulf transaction, and the deferred general and administrative expenses charged against the construction of the Mississippi plant (paragraph 15). This request was based on this Court's decision in United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), cert. denied 425 U.S. 934 (1976).

The trial court denied this request, ruling that

"... the particular kind of specifications of falsity that [Natelli] seems to require or favor should be given with respect to count 2 [false statements in the Merrill Lynch prospectus] and not otherwise.

"Now, I will from time to time try to remind the jury that they have to look at each individual defendant and be aware of the fact that in terms of the indictment certain defendants are not even charged in connection with certain transitions. I think that applied to Mr. Phillips and Mr. Schulz, I guess only to them, and you all know which paragraphs that thought relates to." (A 548)

By refusing to withdraw these specifications from the consideration of the jury, the trial court may well have permitted the jury to convict Harold Yanowitch on specifications which should have been dismissed for insufficient evidence.

In the Natelli case, this Court held that one of two specifications alleged against Scansarola was not supported by sufficient evidence, and that his conviction under the false statement statute (15 U.S.C. §77ff(a)) could not be sustained merely because the other specification was amply supported by the record:

"Inasmuch as the evidence was sufficient to support [co-defendant] Natelli's conviction on either specification, the charge presents no problem to affirmance as to him.

"A difficulty does arise, however, if it is found as a matter of law that there should have been a directed verdict for a defendant on one of the specifications for insufficiency of evidence. The verdict then becomes ambiguous, for the jury could have rejected the specification which the appellate court holds sufficiently proved, and have convicted only on the specification held to be insufficiently proved. In that event, there seems to be no alternative to remand for a new trial. That is the general principle. Yates v. United States, [354 U.S. 309 (1957)]; Stromberg v. California, 283 U.S. 359, 367-68, 51 S. Ct. 532, 75 L.Ed. 1117 (1931)."

--527 F.2d at 325

See also, Street v. New York, 394 U.S. 576, 585-86 (1969); Cramer v. United States, 325 U.S. 1, 36, n. 45 (1945); Williams v. North Carolina, 317 U.S. 287, 292 (1942); United States v. Johns, 444 F.2d 58 (5th Cir. 1971); United States v. Cox, 432 F.2d 1326 (D.C. Cir. 1970); United States v. Guterma, 281 F.2d 742, 747-48 (2d Cir.) cert. denied, 364 U.S. 871 (1960).

In this case, the prosecution had utterly failed to prove Yanowitch's involvement in either the 57 & 31 transaction or the Kece Associates transaction. Likewise, there was no palpable evidentiary basis for permitting the jury to consider whether Yanowitch had hidden anything from Homex's auditors or the SEC by reason of

the accounting matters, essentially falling within Schulz' exclusive competence, alleged in paragraph 15 of the indictment. The balance of the charges against Yanowitch turned upon sharp issues of credibility upon which reasonable men may well have differed.*

In charging the jury, the trial court gave the instruction that before defendants could be convicted on the false statement count, they must find that the prosecution had proven at least one of the misrepresentations alleged in paragraphs 10 through 16 (6007-08). The court did not protect Yanowitch against the distinct possibility that, at the end of a six-week trial marked by abstruse expert testimony and complex factual issues, a beleaguered and confused jury could convict him on a specification which had not been supported by sufficient evidence. It is submitted that the Natelli decision condemns this result, and requires a reversal of the judgment of conviction.

* Although Yanowitch's Natelli charge did not request withdrawal of paragraph 16, relating to stock purchases for union officials, that specification should properly have been withdrawn prior to trial by reason of the Fifth Amendment considerations set forth in Point I, supra.

IV

DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BY
REASON OF THE COURT'S GRATUITOUS SUGGESTION
OF PERJURY DURING ITS CHARGE, EXCLUSION OF
DEFENSE WITNESSES, AND ITS LIMITATION OF THE
CROSS-EXAMINATION OF PROSECUTION WITNESSES

No one will argue that, in the course of a long trial involving complex and technical issues, even so able a district judge as the court below may err without prejudicing a defendant's right to a fair trial. However, in at least three respects, Yanowitch was deprived of that right by the trial court's comments and rulings: its gratuitous assurance to the jury that perjury had been committed, its refusal to permit defense witnesses Turzik and Wind to testify, and its restriction of defendants' cross-examination of prosecution witnesses with regard to practices germane to Homex's business.

In conformity with its prior discussions with counsel, the trial court did not marshal the evidence in its charge (A 216, 410-12). Towards the end of its charge, however, the trial court issued what would amount to a broadside against the three defendants -- David Stirling, Harold Yanowitch and Rubel Phillips -- who had taken the witness stand. At the outset of his discussion of the black-letter law regarding the credibility of witnesses, the trial court charged that:

"Now to go to a subject much less technical and perhaps much more critical in the end, the subject of credibility of witnesses. That is a key problem for juries. I think it is reasonably safe to suggest that you probably heard more than once perjury from the witness stand in this case. Beyond that, of course, you have heard lots of conflicting statements about what happened or didn't happen, about what was said or was not said, and you are relying on the net effect of those witnesses in the last analysis

"for your discovery of the truth, for your accurate recreation of the events upon which you will base an accurate and just decision, and that is the problem of credibility." (A 657; emphasis added)

Shortly after this gratuitous reference to perjury, the trial court understood the implication that the unnamed perjurers to whom he had referred were the defendants. Thus, he told the jury that

"Among interested people who testified you have heard three of the defendants themselves, and you would know without my saying that a defendant in a criminal case has a deep and profound and abiding interest in the outcome of that case. Obviously that is among the factors you will take into account in appraising the credibility of those witnesses." (A 659-60)

To further underscore this contrast, the trial court emphasized that witnesses who had been the recipients of promises of immunity would be especially trustworthy as witnesses:

"In considering whether they may have sworn falsely in this respect, you may also take into account that the cases at least where immunity has been granted, the immunity has been conditioned on the undertaking of the witness to tell only the truth here and elsewhere with the stipulation that the immunity would end if the person was deemed to testify falsely, and you may weigh that with and against the several other things that I have mentioned." (A 660-61)

Even without these reminders, the trial court's suggestion that a crime had been committed on the witness stand was highly unfavorable to the defendants. In its initial summation, the prosecution had itself invited the jury to "resolve the fact question, which is your job, as to whether or not Mr. Marshall's interest in the outcome of this action or Mr. Stirling's interest

in the outcome of this action might suggest some motive to fabricate." (5581). Likewise, at every opportunity, the prosecutor had introduced the fact that his immunized witness was free from prosecution only insofar as he testified truthfully, and that such immunity would be revoked in the event that they made any false statements in this proceeding. (A 298-99 [Frank], 317-19 [Richardson], 344a-6 [Booth], 361 [Mauriello], 474 [Woods]). Defense counsel, of course, could offer no such certification for their own witnesses' veracity.

It is fundamental that a defendant in a criminal proceeding is entitled to the presumption of innocence. When the trial court sua sponte suggested that someone, probably defendants, had perjured themselves, that presumption was lost. See, e.g., United States v. Cisneros, 491 F.2d 1068 (5th Cir. 1974) (trial court's comments on credibility, including statement that "somebody is lying," held reversible error).

Likewise, the trial court prejudiced defendant's case by excluding two key witnesses, Daniel Wind, an official of the State of Israel who had flown to New York to testify, and Peter Turzik, a former official of the Carpenter's Union. In a trial where the bona fides of Homex's practices with respect to recognizing income was a central issue, Wind would have testified that in late June of 1972, the State of Israel was "ready, willing and able to negotiate the final price" --approximately \$2.5 million-- for a shipment of 500 modules which

had already been produced. Counsel for the Stirlings offered this testimony to dispel the prosecution's suggestion "that there were few if any viable projects in the works at that time," shortly before the Stirlings and Yanowitch were asked to resign by Homex's creditor banks (A 469-70). Similarly, the trial court refused to permit Turzik to testify, as a surrebuttal witness, that the prosecution's star rebuttal witness, Theodore Kheel, had lied in his testimony when he claimed that he had never arranged for the purchase of Homex stock by Carpenter's Union officials (A 494). As previously noted, the prosecution's summation unfairly focused on the fact that the defense had been unable to call any Carpenter's Union officials to rebut Kheel. See p. 34 , supra.

Similarly, during the course of the cross-examination of prosecution witness Joseph Griffin with respect to the Greater Gulf issues, the trial court abruptly instructed defendant's counsel to refrain from asking the witness whether certain critical practices engaged in by Greater Gulf "were usual" or "were unusual" (A 323-25). This was not the first time the court had restrained defendant's counsel from eliciting, for the benefit of the laymen on the jury, an experienced specialist's understanding of standard practices. See, e.g., (A 320-22). The effect of this ruling, however, was highly prejudicial, since they effectively precluded defendant from demonstrating, at a key stage of the proceeding, the bona fides of Homex's activities in Mississippi. The trial court itself noted, with its characteristic candor, that "If this [cut-off] is erroneous

it is not harmless [error]" (A 324). We respectfully submit that his assessment was correct. See, e.g., United States v. Wolfson, 437 F.2d 862 (2d Cir. 1970).

CONCLUSION

The judgment of conviction against defendant Harold M. Yanowitch should be reversed, and the indictment dismissed or, in the alternative, a new trial ordered.

Dated: New York, N. Y.
May 9, 1977

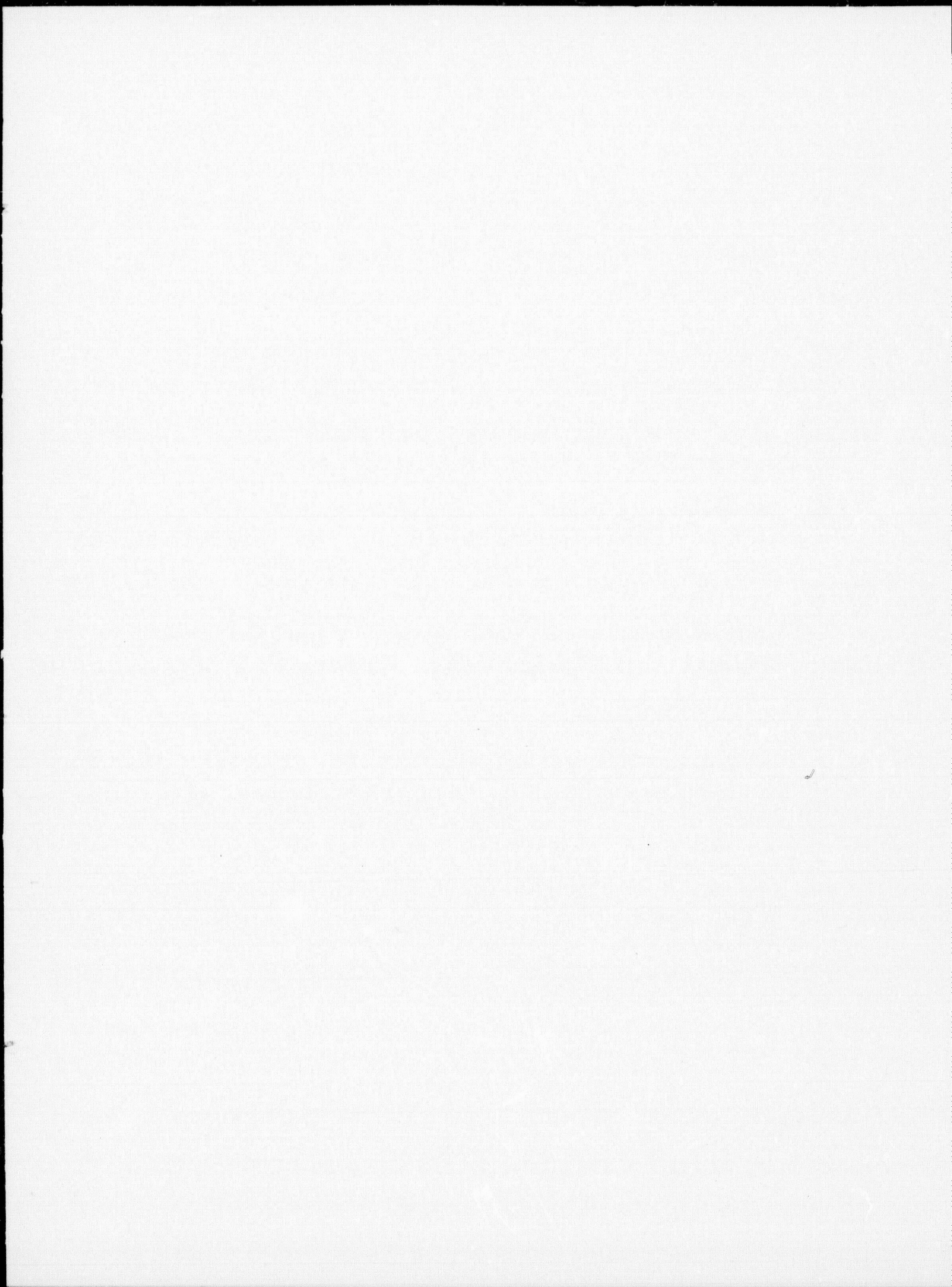
Respectfully submitted,

HAWKINS, DELAFIELD & WOOD
Attorneys for Defendant-Appellant
Harold M. Yanowitch
67 Wall Street
New York, New York 10005

William B. Lawless
Allen P. Rosiny

MEYER, ENGLISH, CIANCIULLI & PEIREZ, P.C.
Attorneys of Counsel for Defendant-
Appellant Harold M. Yanowitch
160 Mineola Boulevard
Mineola, New York 11501

Bernard S. Meyer



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2 Copies
JUN 8 1977
ROBERT B. FISKE JR.
SO. DIST. OF N. Y.